FILED
OCT 9

SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 244.

GUS G. COULTER, S. W. HAGER, AND C. B. HILL, ... APPELLANTS,

vs.

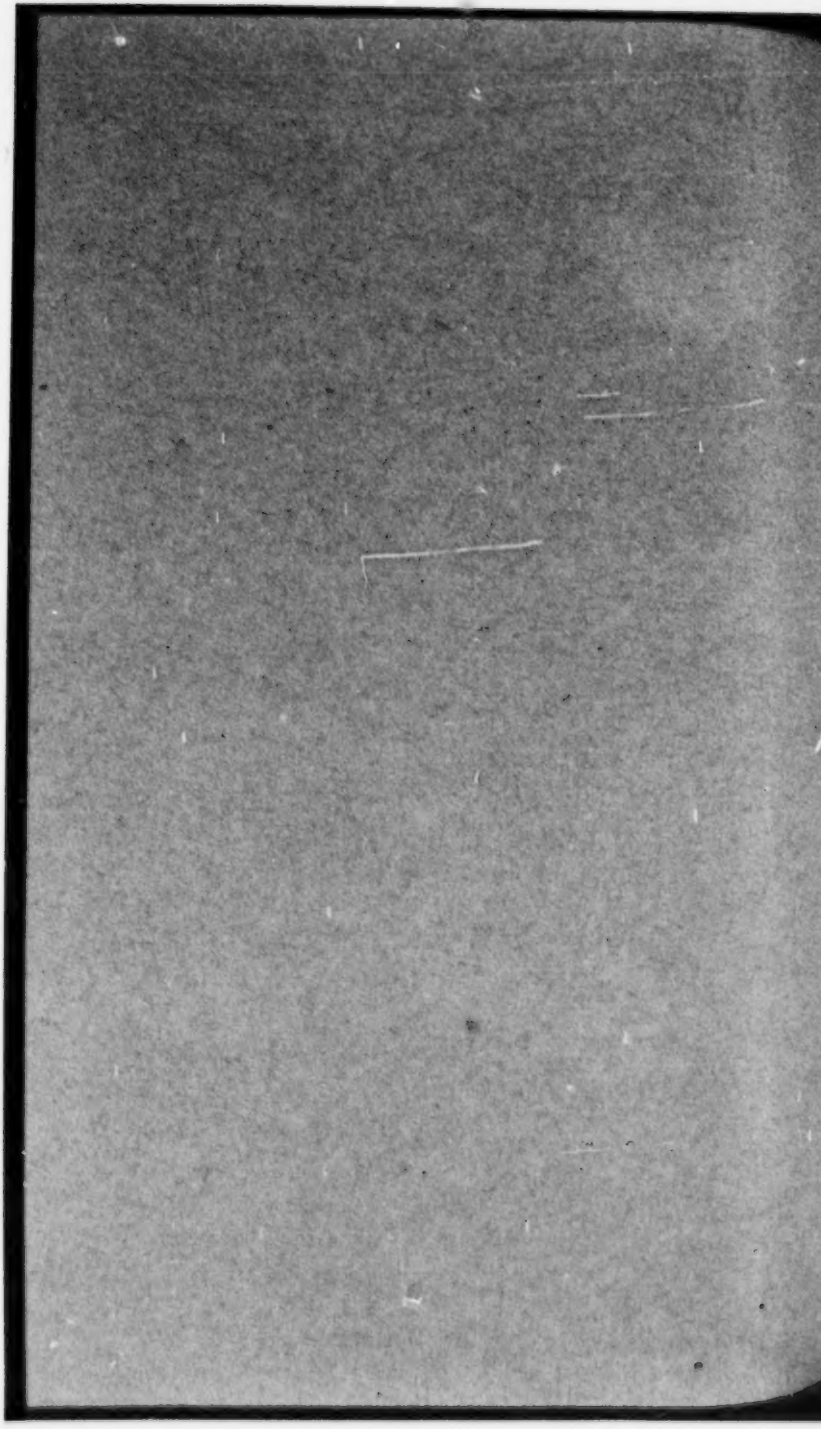
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... APPELLEE.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

MOTION TO APPELLEE, AND MOTION BY APPELLANTS TO ADVANCE FOR HEARING.

NAPOLEON B. HAYS,
Attorney General,

HENRY L. STONE,
WILLIAM O. DAVIS,
Counsel for Appellants.



Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 244.

GUS G. COULTER, S. W. HAGER, AND C. B. HILL, - - - - - - *Appellants*,

vs. NOTICE.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - *Appellee*.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

MESSRS. HELM, BRUCE & HELM,
Attorneys for Appellee:

Please take notice that we shall make a motion for appellants in the above styled case, before the court, at the opening of its session on the second Monday in October, 1904, or as soon thereafter as counsel can be heard, to advance the above styled case for hearing at such time as the court may direct, and, in support of said motion, will file and present to the court, at the hearing of said motion, the grounds therefor, a copy of which motion and grounds is herewith served upon you.

Dated 27th day of July, 1904.

NAPOLEON B. HAYS,
Attorney General,
HENRY L. STONE,
WILLIAM O. DAVIS,
Counsel for Appellants.

Service of notice accepted, August 13, 1904.

JAMES P. HELM,
Counsel for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 244.

GUS G. COULTER, S. W. HAGER, AND C. B. HILL, ... *Appellants,*

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ... *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION BY APPELLANTS TO ADVANCE FOR HEARING.

And now come appellants and move the court to advance this appeal for hearing on the following grounds:

1. The State of Kentucky, while not formally made a party defendant by appellee to its bill of complaint, is, in fact, the real party in interest, and the execution of the revenue laws of said State has been enjoined by the decree appealed from. The appellants are the representatives of said State claiming under its revenue laws, and, as such, they have been enjoined by the Circuit Court from enforcing the collection of taxes, claimed to be due the said State from appellee, on the assessment of its franchise July 1, 1902, for the year 1902, to the extent of $32,098.79.

2. This action was brought by appellee under Section 5 of the act of March 3, 1891, Chapter 517, and appellee claims that it involves (1) the application of the Constitution of the United States, and (2) that the revenue law of the State of Kentucky as administered by appellants in the assessment of appellee's franchise for taxation for the year 1902, is in contravention of the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of the Circuit Court is in issue on this appeal, it being insisted by

appellants (1) that appellee's bill, as amended, failed to state facts sufficient to show jurisdiction in the court below on account of the alleged denial of the equal protection of the laws within the meaning of the Fourteenth Amendment; and (2) that it states facts showing its suit is, in effect, against the State of Kentucky, so far as State taxes are concerned, in violation of the Eleventh Amendment to the Constitution of the United States.

NAPOLEON B. HAYS,
Attorney General.

HENRY L. STONE,
WILLIAM O. DAVIS,
Counsel for Appellants.

FILE COPY.

Office Supreme Court U.S.
FILED
OCT 8 1904
JAMES H. McKENNEY,
Clerk

SUPREME COURT of the UNITED STATES.

October Term, 1904.

No. 244.

GUS G. COULTER, S. W. HAGER and C. B. HILL, — APPELLANTS,

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, — APPELLEE.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

BRIEF FOR APPELLANTS ON MOTION TO ADVANCE FOR HEARING.

NAPOLEON B. HAYS,
Attorney General.
HENRY L. STONE,
WILLIAM O. DAVIS,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 244.

GUS G. COULTER, S. W. HAGER AND C. B. HILL, - - - - - - - - - *Appellants*,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS ON MOTION TO ADVANCE FOR HEARING.

STATEMENT.

May It Please the Court:

The bill of complaint of the appellee, the Louisville & Nashville Railroad Company (R. 2), as amended (R. 27), sought to enjoin the appellants, Gus G. Coulter, S. W. Hager and C. B. Hill, Auditor of Public Accounts, Treasurer, and Secretary of State, respectively, of the State of Kentucky, constituting the Board of Valuation and Assessment of said State, and the decree of the Circuit Court appealed from, entered November 9, 1903 (R. 788), perpetually enjoins said State officers, constituting said board, from enforcing the collection of State taxes on the final assessment amounting to $10,774,899.50, made by them of the appellee's franchise for the year 1902, or on any amount or value exceeding $4,017,154.66, and from apportioning such assessment for said year among the counties, cities, towns and taxing districts in which appellee exercises its franchise, in excess of the latter sum, and appellant Coulter, as auditor aforesaid, from certifying to the counties, cities, towns and taxing districts aforesaid any

apportionment of said franchise assessment in a greater sum in the aggregate than the said sum fixed in the decree appealed from, on the ground that appellee, in the assessment of its franchise by said board, had been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Appellants demurred to appellee's bill of complaint on these grounds, which were overruled, towit (R. 20-21):

"1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

"2. That the said bill does not contain any matter of equity whereon this court can grant any decree or give to the complainant any relief against the defendants, or either of them."

After said decree was entered, as aforesaid, the appellants, Gus G. Coulter, S. W. Hager and C. B. Hill, State officers as aforesaid, and constituting said board, on November 18, 1903, petitioned for and were granted an appeal to this court upon the filing of their assignment of errors. (R. 823-25.) Subsequently, on March 3, 1904, counsel for appellants and appellee agreed upon and filed with the clerk of the Circuit Court their stipulation as to what parts of the record should be copied into the transcript on this appeal (R. 826); and on April 20, 1904, appellants executed their appeal bond, which was approved by the judge of the court below. (R. 831.) Thereupon citation issued and was accepted April 25, 1904, by appellee's counsel. (R. 1.)

Appellants, upon due notice accepted by counsel for appellee, have moved the court to advance this appeal for hearing on the following grounds:

"1. The State of Kentucky, while not formally made a party defendant by appellee to its bill of complaint, is in fact the real party in interest, and the execution of the revenue laws of said State has been enjoined by the decree appealed from. The appellants are the representatives of said State, claiming under its revenue laws, and, as such, they have been enjoined by the Circuit Court from enforcing the collection of taxes claimed to be due the said State from appellee, on the assessment of its franchise, July 1, 1902, for the year 1902, to the extent of $32,098.79.

"2. This action was brought by appellee under Section 5 of the act of March 3, 1891, Chapter 517, and appellee claims that it involves (1) the application of the Constitution of the United States, and (2) that the revenue laws of the State of Kentucky as administered by appellants in the assessment of appellee's franchise for taxation for the year 1902, is in contravention of the Fourteenth Amendment to the Constitution of the United States. The jurisdiction of the Circuit Court is an issue on this appeal, it being insisted by appellants (1) that appellee's bill as amended failed to state facts sufficient to show jurisdiction in the court below on account of the alleged denial of the equal protection of

the laws within the meaning of the Fourteenth Amendment, and (2) that it states facts showing its suit is in effect against the State of Kentucky so far as State taxes are concerned, in violation of the Eleventh Amendment to the Constitution of the United States."

ARGUMENT.

I.

APPELLANTS ARE ENTITLED TO HAVE THEIR APPEAL ADVANCED UNDER SECTION 949, UNITED STATES COMPILED STATUTES.

Section 949, United States Compiled Statutes, is as follows: "When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed, in any suit in a court of the United States, such State, or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties. (Act June 30, 1870, C. 181, 16 Stat., 176)."

Now, while the State of Kentucky is not formally made a party defendant to appellee's bill of complaint, it is, in fact, the real party in interest, and the execution of the revenue laws of said State has been enjoined by the decree appealed from, and the State has been prevented from collecting its taxes against the appellee for the year 1902, due and payable July 1, 1902, to the extent of $32,098.79, and by reason of the decree appealed from, has been kept out of this amount of its revenue now for more than two years. We, therefore, insist that the section referred to entitles appellants to have their appeal advanced and heard at an early date, in preference to the civil causes pending in this court between private parties. Any date in the month of November or prior to the Christmas holidays will be satisfactory to appellant's counsel.

II.

THE CIRCUIT COURT HAD NO JURISDICTION OF THIS ACTION.

The appellants demurred to the bill of complaint as amended, and thus raised the question of the jurisdiction of the Circuit Court.

3. Appellee's action was brought under Section 5 of the act of March 3, 1891, based on the claim that the facts alleged involved the application of the Constitution of the United States, and that the revenue law of the State of Kentucky, as administered by appellants, in the assessment of appellee's franchise for taxation for the year 1902, is in contravention of the Fourteenth Amend-

ment to the Constitution of the United States. The appellants, by their demurrer, insisted (1) that appellee's bill of complaint, as amended, failed to state facts sufficient to show jurisdiction in the court below, on account of the alleged denial of the equal protection of the laws within the meaning of the Fourteenth Amendment; and (2) that the bill as amended states facts showing appellee's suit is, in effect, and to all intents and purposes, against the State of Kentucky, so far as State taxes are concerned, in violation of the Eleventh Amendment to the Constitution of the United States.

The sections of the revenue laws of the State of Kentucky of November 11, 1892, are copied into and made part of appellee's bill of complaint. (R. 6-10.) It will be observed by the court that these sections of said statute in substance provide for the imposition of a franchise tax on the intangible property of certain corporations, including railroad companies, a part of which is payable directly into the State treasury, and the balance is made apportionable to certain counties, cities, towns and taxing districts, the value of such franchise being fixed by a board consisting of the auditor, treasurer and secretary of State. Section 4084 requires the State auditor, after thirty days from the final valuation of the franchise, to certify to the county clerks of the several counties in which a corporation exercises its franchise the portion of the assessment apportioned to them as therein provided, and Section 4091 requires the auditor to give final notice of the tax assessed for State purposes, which becomes due thirty days thereafter, but the auditor has no authority to coerce the payment of the tax.

It is insisted for appellants that where the valuation of a corporation's franchise has been made by said State board and the auditor has given final notice thereof, before suit is brought against him in his official capacity to restrain the collection of such tax, a bill can not be maintained by the corporation to enjoin the collection of that part of the tax due the State, for, as to it, the bill is in effect against the State, which is not subject to suit without its consent under the Eleventh Amendment to the Constitution of the United States.

The original bill in this case (R. 10–12) shows that the State board at the institution of this action had made the final assessment of appellee's franchise for the year 1902, the amount thereof being fixed at $10,774,899.50, the State tax on which for said year amounted to $51,180.27, of which sum appellee, before filing its bill of complaint, had paid the sum of $19,081.48, leaving still due and owing a balance of $32,098.79, on July 1, 1902, from the appellee for State taxes for said year. The State has been, in effect, enjoined from collecting this latter amount from appellee on said final assessment. While the appellee, in its bill, pretends that said assessment was tentative or preliminary, and had not become final, the admissions of the bill show that it had, in fact,

become final, and there was nothing left to be done by either of the appellants, in their official capacity, to make such assessment final, so far as the State was concerned. In other words, the bill admits that appellee had received thirty days' notice under Section 4083, Kentucky Statutes, to appear and show cause against the preliminary assessment, and that appellee did appear before the State Board and insisted that its property should not be assessed above the general level of values fixed for all property in the State, or in excess of 80 per cent. of its full value, but that appellants, acting as the Board of Valuation and Assessment, fixed the value of appellee's entire property in the State of Kentucky at $33,788,724.50, and had deducted $23,013,825, the value of its tangible property as assessed by the railroad commissioners, therefrom, and set down the difference, $10,774,899.50, as the value of appellee's franchise in the State of Kentucky (R. 10–11). Appellee claims in its bill that it is entitled to have this final assessed value as fixed by said board decreased 20 per cent., and further admits that said board has declined to reduce said assessment as requested (R. 11). The original bill was filed July 2, 1902. An amended bill was filed November 18, 1902 (R. 18–19), which expressly admits that the assessment of appellee's franchise had been made at that date for said year, but alleges that the apportionment thereof had not yet been certified by the auditor to the various counties, cities, towns, and taxing districts, and no coercive steps had been taken by the State to collect its taxes upon the total assessment. The bill further alleges: "These steps will be taken, and the assessment as made will be certified down as aforesaid, unless the said defendants are restrained." (R. 19.)

The demurrer of appellants on the grounds above mentioned was to the bill as amended. (R. 785.) On the face of the bill as amended therefore, it is clear that appellee's suit was against the State of Kentucky and could not be maintained without its consent.

In a similar case, under the provisions of the same statute of the State of Kentucky, the Circuit Court of Appeals of the Sixth Circuit in the case of *Coulter, Auditor, vs. Weir*, decided February 13, 1904 (*127 Fed. Rep., 897*), held that such a suit after final assessment was a suit against the State, and could not, therefore, be maintained against the will of the State. In the course of the opinion by Circuit Judge Lurton in that case, he said (906-7):

"In respect to the tax due the State the auditor has no other act to do under the statute, and has no authority to enforce the collection of that tax. The tax so due is payable 'into the treasury' by the express terms of Section 4086. The bill does charge that the defendant 'is threatening to proceed to enforce and collect said tax and penalties,' and the prayer of the bill is that the defendant be commanded 'to refrain from collecting or attempting to collect any of said tax alleged to be due the State of Kentucky.' As we have elsewhere stated, the defendant denies

that he had any power to distrain for the tax so due the State, and avers that the law of Kentucky contains no provision for the enforcement of the franchise tax so assessed in behalf of the State except by a suit brought in a court having jurisdiction, in the name of the State and by the State's attorney general. Counsel representing the appellee have not pointed out any provision of law under which the defendant, as auditor, had any power or authority to coerce the payment of the tax so assessed, and we have searched in vain for any remedy against a recalcitrant taxpayer of such a franchise tax, so far as same is due the State, other than those found in Sections 4091 and 113, Ky. St., 1903. By Section 113 it is made the duty of the attorney general 'to institute proper procedure to coerce payment of all demands of the Commonwealth, payable at the treasury, not discharged in proper time.' And by Section 4091 it is provided that any tax assessed upon the franchise of any of the companies mentioned in the article, not paid, after 30 days' notice, shall be deemed delinquent, and that a penalty of 10 per cent. shall attach; and that the delinquent 'failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.' This remedy by suit appears to have been in fact resorted to in respect to some of the tax here involved, for the defendant testifies that actions have been brought to enforce same in the Franklin Circuit Court.

"To enjoin the defendant from collecting or attempting to enforce the payment of this tax would be manifestly fruitless, unless the decree is to affect and conclude the State. The decree appealed from did not stop with an order commanding the defendant to take no other or further step under the law, because he had under the law no other or further duty in connection with the matter, but adjudicated the amount due under a legal assessment, and undertook to annul the assessment in excess of that sum. The court in this exceeded its jurisdiction, for jurisdiction over the defendant did not give it jurisdiction over the State of Kentucky, as the decree seems to assume. If the defendant had been about to take some step under color of the law tending to complete the assessment, or if he had been authorized to seize property and was about to do so, then he was, assuming the case to be with the complainants on the merits, about to commit a trespass for which he would be individually liable, and in a proper case equity might enjoin his proposed action upon the ground of his want of legal authority. But this is not the case made in respect to the tax due the State, and the bill, so far as it sought relief against the State tax, must be dismissed without regard to the merits."

The demurrer of appellants to the bill as amended, on the ground that it showed the court below had no jurisdiction of this action, should have been sustained, at least so far as any relief was sought by appellee against the balance of State taxes due on said final assessment of its franchise for the year 1902, and the action to that extent should have been dismissed without regard to the merits.

For the consideration of the court on appellant's motion to advance this action for hearing, reference is made to Exhibit No. 6, with the deposition of the appellant, Coulter, as auditor aforesaid, taken by appellee (R. 491), which shows the notice to appellee of said board's tentative or preliminary assessment was given May 14, 1902. That assessment shows the value of the appellee's franchise was first fixed at $12,912,626, and the State tax thereon amounted to $61,334.97. The court is also referred to Exhibit No. 4, with the same deposition (R. 488–89), which shows that after a full hearing and the expiration of thirty days' time allowed by statute, after notice of the preliminary assessment, the appellee was given notice on July 1, 1902, the day before this action of appellee was instituted, of the fact that the board had finally assessed the value of the appellee's franchise at $10,774,-899.58, and the State tax thereon amounted to $51,180.77. Thus the court will observe that appellee succeeded, on the hearing awarded to it, in having said board reduce the preliminary assessment of its franchise for said year by $2,137,726.42, and its State tax by the sum of $10,154.20; but not being satisfied with such reduction obtained before said board, appellee brought this action to enjoin the State from collecting its taxes to the extent of $32,-098.79, being the balance after such reduction and the payment aforesaid of $19,081.48.

The original bill alleges that the amount involved or in controversy in this action, without considering the local taxes, exceeds, exclusive of interest and costs, the sum of $2,000, but there is no allegation in the original or amended bill stating the amount or value of the local taxes due the counties, cities, towns and taxing districts on said assessment, and it can not be discovered from the allegations of the bill as amended whether or not such local taxes involved herein, exclusive of interest and costs, exceed the sum of $2,000.

In the case of *Coulter, Auditor, vs. Fargo*, decided by the Circuit Court of Appeals of the Sixth Circuit, February 13, 1904 (*127 Fed. Rep., 912*) the court, in an opinion by Circuit Judge Lurton, held that where, in a suit to restrain the enforcement of a franchise tax against a corporation amounting to about $3,000 it was averred that $1,117.04 of such amount was claimed by the State, and the balance by the counties, cities, towns and taxing districts for local purposes, and the bill was not sustainable in so far as it affected the amount ~~collected~~ claimed by the State, on the ground that the

suit was really against the State, which can not be sued without its consent, the amount of the tax in controversy which remained was insufficient to confer jurisdiction on the Federal courts. On this point the court said (*Ib.*, 913):

"It thus appears that the jurisdictional amount essential to give the Circuit Court jurisdiction is only attained by aggregating the taxes claimed by the State with the taxes for local purposes in case the defendant is permitted to certify the assessment to the county clerks for purposes of local assessment. It has been objected that the taxes claimed by the State can not be added to those claimed by local municipalities for the purpose of obtaining the necessary jurisdictional amount, and the cases of Walter vs. Northeastern Railroad Co., 147 U. S., 370, 13 Sup. Ct., 348, 37 L. Ed., 206, and Fishback vs. W. U. Tel. Co., 161 U. S., 96, 16 Sup. Ct., 506, 40 L. Ed., 630, have been cited. The real jurisdictional difficulty lies in the fact that the bill will not lie in respect of the tax claimed by the State. The valuation and assessment for State purposes was complete when the bill was filed. The tax due the State was then due and payable into the treasury of the State. The defendant, as auditor, was charged with no further duty in respect to the State tax, and had no power to coerce its payment. As we had occasion to decide in Coulter vs. Weir, the law of Kentucky provides no summary process for the collection of this tax so far as it is due to the State, and the only remedy for its collection is by a suit in the name of the State, brought by the State's attorney general. To enjoin the defendant from collecting the tax so assessed would be idle, inasmuch as he has no control over the suit necessary for its enforcement, even if it were competent to enjoin the State or its officers from bringing a suit for such a purpose. Fitts vs. McGhee, 172 U. S., 516, 19 Sup. Ct., 269, 43 L. Ed., 535; Arbuckle vs. Blackburn, 113 Fed., 616, 51 C. C. A. 122. The suit, therefore, though nominally against the defendant, Coulter, is in effect a suit against the State so far as it sought to annul or enjoin the enforcement of the tax assessed for State purposes. Inasmuch as the suit can not be maintained in respect to the tax due the State, the requisite amount to give a Federal court jurisdiction can not be made by aggregating the tax claimed by the State and that claimed by other taxing municipalities. In other words, the court did not have jurisdiction, because the matter in dispute did not exceed in value the sum of $2,000, unless it had jurisdiction over the tax due to the State as well as that due to the counties, cities and towns. It follows that this bill should have been dismissed so far as relief was sought in respect of the tax due the State of Kentucky, because it was really a suit against the State, which was an objection made by demurrer and raised by the answer. Fishback vs. W. U. Tel. Co., 161 U. S., 96, 16 Sup. Ct., 506, 40 L. Ed., 630. This left the suit unmaintainable for the other purposes of the bill, because the necessary jurisdictional amount was not involved."

It is claimed by appellants that while the question of jurisdiction is not the only question in issue, when this court comes to pass on the same it will doubtless reach the conclusion that the Circuit Court had no jurisdiction of this action, and therefore appellants' motion to advance this appeal for hearing comes within the spirit, if not the letter, of Rule 32 of this court, and should be sustained.

In view of the large amount of taxes which the State of Kentucky has, for more than two years, been enjoined from collecting by the decree appealed from, and upon the grounds and authorities hereinabove set forth, the court is earnestly asked to sustain appellants' motion to advance for hearing the appeal herein, and fix a day for the oral argument thereof by counsel at as early a day as practicable, on the question of jurisdiction, and also upon the merits under the other errors assigned, in the event this court shall hold, contrary to our expectation, that appellee's bill of complaint, as amended, states a cause of action within the jurisdiction of the Circuit Court.

All of which is respectfully submitted.

NAPOLEON B. HAYS,
Attorney General,
WILLIAM O. DAVIS,
HENRY L. STONE,
Counsel for Appellants.

AUTHORITIES CITED.

I.

APPELLANTS ARE ENTITLED TO HAVE THEIR APPEAL ADVANCED FOR HEARING.

Section 949 U. S. Compiled Statutes.
Rule 32, U. S. Supreme Court Rules.

II.

THE CIRCUIT COURT HAD NO JURISDICTION OF THIS ACTION.

Coulter, Auditor, vs. Weir, 127 Fed. Rep., 897.
Coulter, Auditor, vs. Fargo, 127 Fed. Rep., 912.